

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

TERRY RAMSEY,

Plaintiff,

vs.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

Civil No. 07-196-AA
OPINION AND ORDER

Tim Wilborn
Wilborn Law Office, P.C.
19093 S. Beaver Creek Road, PMB #314
Oregon City, OR 97045
Attorney for Plaintiff

Karin Immergut
United States Attorney
District of Oregon
Neil Evans
Assistant United States Attorney
1000 S.W. Third Avenue
Portland, Oregon 97204-2902

Kathryn A. Miller
Special Assistant U.S. Attorney
Social Security Administration
701 Fifth Avenue, Suite 2900 M/S 901
Seattle, Washington 98104-7075
Attorneys for Defendant

1 AIKEN, Judge:

2 Claimant, Terry Ramsey, brings this action pursuant to the
3 Social Security Act (the Act), 42 U.S.C. §§ 405(g) and
4 1383(c)(3), to obtain judicial review of a final decision of the
5 Commissioner. The Commissioner denied the plaintiff's
6 application for Disability Insurance Benefits (DIB) under Title
7 II of the Social Security Act and for Supplemental Security
8 Income (SSI) disability benefits under Title XVI of the Act. For
9 the reasons set forth below, the Commissioner's decision is
10 reversed and remanded for payment of benefits.

11 **PROCEDURAL BACKGROUND**

12 Plaintiff filed his application for DIB and SSI benefits on
13 March 23, 2001. Tr. 89-91, 622-624. On July 9, 2001, the Social
14 Security Administration initially denied plaintiff's application
15 for benefits. Tr. 73-77. On September 28, 2001, plaintiff's
16 application was denied again on reconsideration. Tr. 79-81.
17 Plaintiff requested a hearing before an Administrative Law Judge
18 (ALJ). Tr. 82. On June 26, 2003, after a hearing, the ALJ found
19 plaintiff not disabled and therefore denied him benefits. Tr.
20 643-59. Plaintiff then requested review by the Appeals Council.
21 Tr. 660. On October 1, 2004, the Appeals Council vacated the
22 ALJ's decision and remanded the case back to the Commissioner.
23 Tr. 684-85.

24 On November 23, 2005, after a new hearing, the ALJ again
25 found plaintiff not disabled. Tr. 22-36. Plaintiff requested
26 review of the ALJ's decision. Tr. 20-21. However, on December
27 20, 2006, the Appeals Council denied plaintiff's request for
28 review, making the ALJ's decision the final agency decision. Tr.

1 10-13. See also 20 C.F.R. § 422.210. Plaintiff now seeks
2 judicial review. 42 U.S.C. § 405(g).

3 **STATEMENT OF THE FACTS**

4 Plaintiff was under fifty years old as of the date of the
5 hearing decision and is considered a "younger person" for
6 purposes of this case. Tr. 89. See 20 C.F.R. § 404.1563(c).
7 Plaintiff has an eleventh grade education. Tr. 118. Plaintiff
8 performed work as a gas station attendant. Tr. 806. Plaintiff
9 allegedly became disabled on July 1, 1999 as a result of a
10 combination of impairments including an esophageal impairment,
11 degenerative disc disease of the cervical spine, attention
12 deficit hyperactivity disorder (ADHD), a personality disorder,
13 and depression. Tr. 28, 89, 112. The relevant medical evidence
14 is discussed below.

15 **STANDARD OF REVIEW**

16 This court must affirm the Secretary's decision if it is
17 based on proper legal standards and the findings are supported by
18 substantial evidence in the record. Hammock v. Bowen, 879 F.2d
19 498, 501 (9th Cir. 1989). Substantial evidence is "more than a
20 mere scintilla. It means such relevant evidence as a reasonable
21 mind might accept as adequate to support a conclusion."
22 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting
23 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).
24 The court must weigh "both the evidence that supports and
25 detracts from the Secretary's conclusions." Martinez v. Heckler,
26 807 F.2d 771, 772 (9th Cir. 1986).

27 The initial burden of proof rests upon the claimant to
28 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486

1 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate
2 an "inability to engage in any substantial gainful activity by
3 reason of any medically determinable physical or mental
4 impairment which can be expected . . . to last for a continuous
5 period of not less than 12 months. . . ." 42 U.S.C.

6 § 423(d)(1)(A).

7 The Secretary has established a five-step sequential
8 process for determining whether a person is disabled. Bowen v.
9 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,
10 416.920. First, the Secretary determines whether a claimant is
11 engaged in "substantial gainful activity." If so, the claimant
12 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.
13 §§ 404.1520(b), 416.920(b).

14 In step two, the Secretary determines whether the claimant
15 has a "medically severe impairment or combination of
16 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
17 §§ 404.1520(c), 416.920(c). If not, the claimant is not
18 disabled.

19 In step three, the Secretary determines whether the
20 impairment meets or equals "one of a number of listed impairments
21 that the Secretary acknowledges are so severe as to preclude
22 substantial gainful activity." Id.; see 20 C.F.R.
23 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
24 presumed disabled; if not, the Secretary proceeds to step four.
25 Yuckert, 482 U.S. at 141.

26 In step four, the Secretary determines whether the claimant
27 can still perform "past relevant work." 20 C.F.R.
28 §§ 404.1520(e), 416.920(e). If the claimant can work, he is not

1 disabled. If he cannot perform past relevant work, the burden
2 shifts to the Secretary. In step five, the Secretary must
3 establish that the claimant can perform other work. Yuckert, 482
4 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &
5 (f). If the Secretary meets this burden and proves that the
6 claimant is able to perform other work which exists in the
7 national economy, he is not disabled. 20 C.F.R. §§ 404.1566,
8 416.966.

9 Here, the ALJ found that at step one the plaintiff had not
10 engaged in substantial gainful activity since his alleged
11 disability onset date. Tr. 27, 35 (Finding 2). This finding is
12 not in dispute.

13 At step two, the ALJ found plaintiff had a personality
14 disorder, depression, possible attention deficit disorder (ADD),
15 degenerative disc disease of the cervical spine, and esophageal
16 impairment. Tr. 28, 35 (Finding 3). These impairments were
17 deemed severe. Id. This finding is not in dispute.

18 At step three, the ALJ found the plaintiff's impairments
19 did not meet or equal the requirements of a listed impairment.
20 Tr. 28-29, 35 (Finding 4). This finding is disputed. Plaintiff
21 argues his esophageal impairment meets or equals Listing 5.04.

22 At step four, the ALJ found the plaintiff was not able to
23 perform his past relevant work. Tr. 33, 35-36 (Finding 7). This
24 finding is not in dispute.

25 At step five, the ALJ found that, based on plaintiff's
26
27
28

1 residual function capacity,¹ plaintiff could perform work existing
 2 in significant numbers in the national economy, including
 3 performing as a electronics worker, decorator of leather
 4 products, and as a blind-stitch machine operator. Tr. 36
 5 (Finding 12). This finding is in dispute. Plaintiff argues the
 6 ALJ wrongly considered potential step five occupations,
 7 identified by the vocational expert, that plaintiff can perform,
 8 since such occupations are beyond plaintiff's residual function
 9 capacity. Plaintiff contends the ALJ did not consider all of
 10 the plaintiff's restrictions. In addition, plaintiff argues the
 11 ALJ did not consider all of these restrictions as part of the
 12 ALJ's vocational hypothetical. Finally, plaintiff asserts that
 13 he can not sustain work activity at any exertional level on a
 14 regular and continuous basis.

15 Overall, plaintiff alleges the ALJ erred by: (1)
 16 discounting plaintiff's allegations as not credible; (2)
 17 improperly rejecting third-party lay witness testimony; (3)
 18 wrongfully dismissing expert medical evidence provided by
 19 plaintiff's physicians; (4) improperly ignoring the VA disability

20
 21 ¹ The ALJ found plaintiff to have the following residual
 functional capacity (RFC):

22 He is able to lift 20 pounds occasionally, 10 pounds
 23 frequently, stand or walk for about six hours, and sit for
 24 about six hours during an eight hour work day. The claimant
 25 is able to do a job in which he only occasionally performs
 26 stooping, squatting, twisting, or bending activities, and
 27 avoids even moderate exposure to hazards such as machinery
 or heights. He can perform activities in which his head is
 not lower than his stomach, in a job that allows for brief
 inattention (up to one minute) due to pain. He is able to
 do a job that involves limited interactions with coworkers
 or the general public.

28 Tr. 35-36 (Finding 6).

1 ratings; (5) failing to find that his esophageal impairment met
2 or equaled a listed impairment; and (6) improperly determining
3 that step five occupations identified by the vocational expert
4 were within plaintiff's RFC. Plaintiff requests this case be
5 reversed and remanded with payment of benefits.

6 Defendant concedes this case should be reversed and
7 remanded but asks this court to remand for further administrative
8 proceedings. In response to plaintiff's claims, defendant
9 concedes the ALJ erred in: (1) discrediting plaintiff's
10 credibility on the basis of work activity that occurred in a
11 therapeutic setting, as well as based on his alleged non-
12 compliance with his medications; (2) assigning little weight to
13 plaintiff's VA disability rating; (3) improperly characterizing
14 the treating relationship between Dr. Anthony Haulk and
15 plaintiff, and failing to provide adequate reasons for
16 discounting the medical opinion of VA psychologist Gerald Otis;
17 and (4) failing to incorporate into plaintiff's RFC all of the
18 limitations identified by the medical expert at the hearing. The
19 defendant denies all other assertions of error.

20 As such, defendant proposes that on remand, the ALJ will
21 "(1) reassess Plaintiff's credibility; (2) further evaluate the
22 opinions of Drs. Otis, Haulk, and Neal Thompson as well as other
23 treating and examining sources; (3) evaluate the Plaintiff's VA
24 disability rating in accordance with McCarty v. Massanari, 298
25 F.3d 1072, 1076 (9th Cir. 2002); and (4) reassess Plaintiff's
26 RFC, incorporating any limitations included in the medical
27 evidence that are not specifically rejected." Def. Memo in
28 Support of Remand, p. 6.

DISCUSSION

A. Legal Standard for Remand

Plaintiff contends this case should be reversed and remanded for payment of benefits as a result of the ALJ's improper rejection of plaintiff's credibility, Dr. Haulk and Dr. Otis' medical opinions, lay witness testimony, and VA disability ratings. Although the Commissioner concedes the ALJ did not take into account all of the relevant information, he argues this case should be remanded for further administrative proceedings. Additional proceedings would be appropriate if enhancing the record would be useful for resolving the disputed issues. Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004). However, if the record has been fully developed it is appropriate to direct an award of benefits. Smolen v. Chater, 80 F.3d 1273, 1292 (9th Cir. 1996).

Specifically, the court should credit evidence that was rejected by the ALJ and remand for an immediate award of benefits if: the ALJ failed to provide legally sufficient reasons for rejecting the evidence; (2) there are no outstanding issues that must be resolved before a determination of disability can be made; and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited. Id. See also Benecke, 379 F.3d at 593; Harman v. Apfel, 211 F.3d 1172, 1178 (9th Cir. 2000).² It is within the court's discretion to remand for further proceedings or to award

² The court in Harman found that this three-part test is really a two party inquiry, in which the third prong is a subcategory of the second. See Harman, 211 F.3d at 1178 n. 7.

1 payment of benefits. Holohan v. Massanari, 246 F.3d 1195, 1210
2 (9th Cir. 2001).

3 Courts have held benefits should be awarded if an ALJ has
4 improperly rejected an applicant's subjective symptom testimony,
5 physicians' opinions, or lay testimony based on legally
6 insufficient reasons. See, e.g., Benecke, 379 F.3d at 594;
7 Holohan, 246 F.3d at 1211; Schneider v. Apfel, 223 F.3d 968, 976
8 (9th Cir. 2000); Smolen, 80 F.3d 1273 at 1292. Therefore, I must
9 assess whether the ALJ properly rejected the plaintiff's
10 credibility, lay witness testimony, physicians' opinions, and the
11 VA disability ratings based on legally sufficient reasons. In
12 addition, I will assess, if need be, whether the ALJ erred in
13 failing to find plaintiff's esophageal impairment met or equaled
14 a listed impairment and whether the ALJ improperly relied on the
15 vocational expert's conclusions.

16 B. Plaintiff Claims

17 1. ALJ's Rejection of Plaintiff's Credibility.

18 Plaintiff alleges the ALJ erred in rejecting the testimony
19 that plaintiff offered at the hearing. Plaintiff argues his
20 testimony, establishing that he was unable to sustain any level
21 of work activity because of his physical and mental impairments.
22 Plaintiff's Opening Brief, pp. 2-5, 17-19; Plaintiff's Reply, pp.
23 11-12. The Commissioner agrees the ALJ erred in discrediting
24 plaintiff's credibility on the basis of work activity that
25 occurred in a therapeutic setting, as well as based on his
26 alleged non-compliance with his medications. However, the
27 Commissioner argues that remand is appropriate to allow the ALJ
28 to reassess plaintiff's credibility.

1 An ALJ must provide "clear and convincing" reasons for
 2 rejecting the claimant's testimony as to subjective symptoms once
 3 the claimant produces medical evidence of an underlying
 4 impairment. Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995).
 5 Furthermore, the ALJ must identify specific testimony that is not
 6 credible and provide evidence that undermines the claimant's
 7 complaints. Id. Moreover, pain testimony is accepted as true if
 8 the ALJ does not give specific reasons for rejecting such
 9 testimony or if such reasons are not supported by substantial
 10 evidence. Varney v. Secretary of Health & Human Servs., 859 F.2d
 11 1396, 1401 (9th Cir. 1988).

12 An ALJ may consider the following factors to determine
 13 whether the claimant's testimony regarding the severity of his
 14 symptoms is credible: "(1) ordinary techniques of credibility
 15 evaluation, such as the claimant's reputation for lying, prior
 16 inconsistent statements concerning the symptoms, and other
 17 testimony by the claimant that appears less than candid; (2)
 18 unexplained or inadequately explained failure to seek treatment;
 19 and (3) the claimant's daily activities." Smolen, 80 F.3d at
 20 1284 (internal citations omitted). In evaluating the credibility
 21 of symptom testimony, the ALJ must also consider the factors set
 22 out in Social Security Ruling (SSR) 96-7p.³

24 ³ SSR 96-7 directs the ALJ as follows:

25 When additional information is needed to assess the
 26 credibility of the individual's statements about symptoms
 27 and their effects, the adjudicator must make every
 28 reasonable effort to obtain available information that could
 shed light on the credibility of the individual's
 statements. In recognition of the fact that an individual's
 symptoms can sometimes suggest a greater level of severity
 of impairment than can be shown by the objective medical

On May 20, 2003 plaintiff testified to numerous physical ailments, including extreme chest pain resulting from a esophageal condition. Tr. 812-14. See also Plaintiff's Opening Brief, pp. 2-5. In addition, plaintiff reported his physical limitations, such as lifting restrictions. Tr. 824-25.

The ALJ noted she "must consider all symptoms, including pain, and the extent to which these symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence based on the requirements of 20 C.F.R. §§ 404.1529 and 416.929, and Social Security Ruling 96-7p." Tr. 29. In general, the ALJ found the "claimant's allegations regarding his limitations [as] not totally credible in light of the medical record." Tr. 35 (Finding 5). Specifically, the ALJ found

evidence alone, 20 C.F.R. §§ 404.1529(c) and 416.929(c) describe the kinds of evidence, including the factors below, that the adjudicator must consider in addition to the objective medical evidence when assessing the credibility of an individual's statements:

1. The individual's daily activities;
2. The location, duration, frequency, and intensity of the individual's pain or other symptoms;
3. Factors that precipitate and aggravate the symptoms;
4. The type, dosage, effectiveness, and side effects of any medication the individual takes or has taken to alleviate pain or other symptoms;
5. Treatment, other than medication, the individual receives or has received for relief of pain or other symptoms;
6. Any measures other than treatment the individual uses or has used to relieve pain or other symptoms (e.g., lying flat on his or her back, standing for 15 to 20 minutes every hour, or sleeping on a board); and
7. Any other factors concerning the individual's functional limitations and restrictions due to pain or other symptoms.

1 plaintiff's testimony less than credible because he worked "in
2 incentive therapy employment as a housekeeper at the VA on a
3 nearly full time basis" which is "persuasive evidence that he is
4 capable of some type of work activity." Tr. 29. The ALJ also
5 found plaintiff less credible because plaintiff allegedly failed
6 to comply with his mental health treatment and plaintiff's daily
7 activities were inconsistent with his alleged disability. Tr.
8 29-31.

9 I find the ALJ did not provide clear and convincing reasons
10 for rejecting plaintiff's testimony as to his physical and mental
11 impairments related to his work capabilities. There is not
12 substantial evidence in the record to show plaintiff's testimony
13 should be discredited. The Commissioner concedes, as Dr. Otis
14 suggested, that incentive therapy (IT) "is not competitive
15 employment but is a therapeutic activity" that may or may not
16 involve actual work or vocational training. Def. Memo. in
17 Support of Remand, p. 8. Dr. Otis noted plaintiff was not even
18 considered for a Compensated Work Therapy (CWT) position which
19 involved actual work. Tr. 749.

20 Further, the ALJ's listing of plaintiff's daily activities,
21 such as grooming and hygiene, are insufficient to conclude that
22 plaintiff was able to sustain constant work activity as is
23 required in regular, competitive employment. Tr. 30-31. I find
24 the ALJ has not provided specific reasons supported by
25 substantial evidence in the record to discredit plaintiff's
26 allegations of his physical and mental impairments as related to
27 his work capabilities.
28

1 2. ALJ's Rejection of Lay Witness Testimony.

2 Plaintiff contends the ALJ failed to consider statements
3 made by friends Mike Tucker (Tr. 126-37, 735), Danny Imel (Tr.
4 732-34), and Cora Sowell (Tr. 736), which described plaintiff's
5 esophageal attacks limiting his ability to function in work
6 settings. An ALJ must take into account lay testimony regarding
7 plaintiff's symptoms unless "he or she expressly determines to
8 disregard such testimony and gives reasons germane to each
9 witness for doing so." Lewis v. Apfel, 236 F.3d 503, 511 (9th
10 Cir. 2001) (internal citations omitted). Further, an ALJ may
11 discount lay testimony if it conflicts with medical evidence.
12 Id. (citing Vincent v. Heckler, 739 F.2d 1393, 1395 (9th Cir.
13 1984)).

14 The ALJ responded to these letters by stating that
15 plaintiff's overall condition as related to his esophageal
16 condition improved after surgery, especially with plaintiff's use
17 of nitroglycerin. Tr. 28. Thus, the ALJ did not expressly
18 discredit these third-party statements. Even so, the ALJ
19 determined plaintiff's condition did not meet or medically equal
20 listing 5.03 and 5.04 because his medical records did not
21 demonstrate he incurred recurrent ulceration and did not show
22 that he had the requisite weight loss. Tr. 28. The ALJ seems to
23 rely on gastroenterologist Dr. David William's testimony stating
24 that there was no evidence of esophageal spasms. Tr. 32. These
25 findings were given more credit than Dr. Anthony Haulk's
26 determination that plaintiff's esophageal condition was recurrent
27 after surgery. Tr. 29, 31. Therefore, I must assess whether the
28 ALJ improperly rejected Dr. Haulk's statements and other

1 physicians' medical opinions.

2 3. ALJ's Rejection of Medical Expert Testimony

3 Plaintiff argues the ALJ improperly rejected the opinions
4 of Drs. Gerald Otis and Anthony Haulk. The medical opinions of
5 three types of physicians are distinguished under Title II's
6 implementing regulations: "(1) those who treat the claimant
7 (treating physicians); (2) those who examine but do not treat the
8 claimant (examining physicians); and (3) those who neither
9 examine nor treat the claimant [but who review the claimant's
10 file] (non-examining [or reviewing] physicians)." Holohan v.
11 Massanari, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (internal
12 citations omitted). Generally, a treating physician's opinion is
13 entitled more weight than the opinions of examining or reviewing
14 physicians. Id. at 1202. Likewise, an examining physician's
15 opinion is entitled to more weight than a reviewing physician's
16 opinion. Id. Physicians normally provide two types of opinions
17 in disability benefits cases: "medical opinions that speak to the
18 nature and extent of a claimant's limitations, and opinions
19 concerning the ultimate issue of disability, i.e. opinions about
20 whether a claimant is capable of any work given her or his
21 limitations." Id.

22 A treating physician's medical opinion must be given
23 controlling weight if it is not inconsistent with other
24 substantial evidence and is supported by medically acceptable
25 diagnostic techniques. Id. See also 20 C.F.R. § 404.1527(d)(2);
26 SSR 96-2p. An ALJ must provide "clear and convincing" reasons
27 for rejecting the uncontradicted medical opinions of a treating
28 and examining physician. Lester v. Chater, 81 F.3d 821, 830 (9th

1 Cir. 1995). A treating physician's opinion must still be given
2 weight, even if not controlling, if it is inconsistent with other
3 substantial evidence in the record. If the ALJ decides to
4 discount a treating physician's medical opinion that is
5 controverted and relies on the medical opinion of a non-treating
6 doctor, he or she must still provide "specific and legitimate"
7 reasons. Holohan, 246 F.3d at 1202-03.

8 The Ninth Circuit has upheld a Commissioner's decision
9 rejecting a treating or examining physician's opinion in favor of
10 a non-examining's testimony. See, e.g., Magallanes v. Bowen, 881
11 F.2d 747, 751-5 (9th Cir. 1989); Andrews v. Shalala, 53 F.3d
12 1035, 1043 (9th Cir. 1995). In Magallanes, the ALJ relied on the
13 non-examining physician's testimony and laboratory results,
14 despite contrary reports from plaintiff's examining physician,
15 and on plaintiff's testimony which conflicted with her treating
16 physician's opinion. 881 F.2d at 751-52. In Andrews, the ALJ
17 rejected the examining psychologist's opinion because it
18 conflicted with the opinions of five non-examining mental health
19 professionals, claimant's testimony, and other medical evidence
20 in the record. 53 F.3d at 1042-43. Further, the ALJ relied on
21 the fact the non-examining medical advisor had more expertise in
22 substance abuse, the claimant's alleged disability, than the
23 examining psychologist possessed. Id. at 1042. However, the
24 opinion of a non-examining physician can not be the sole basis
25 for rejecting a treating or examining physician's medical
26 opinion. Lester, 81 F.3d at 831. See also Pitzer v. Sullivan,
27 908 F.2d 502, 506 n.4 (9th Cir. 1990); Gallant v. Heckler, 753
28 F.2d 1450, 1456 (9th Cir. 1984).

1 Here, the ALJ's decision to reject the opinions of the
2 treating physician (Dr. Haulk) and that of the examining
3 psychologist (Dr. Otis) was not warranted. The ALJ based her
4 rejection of the treating and examining sources' opinions on the
5 reviewing opinions provided by Dr. Williams, a
6 gastroenterologist, and state agency psychologists. Tr. 32. In
7 addition, the ALJ relied on Dr. Ben Prins' opinion who found
8 plaintiff medically stable to work and the plaintiff's
9 occupational therapist who claimed plaintiff could do light work
10 with limitations in bending, reaching, and twisting. Tr. 30.

11 Plaintiff relied on Dr. Haulk's medical opinions. Dr.
12 Haulk first performed a medical procedure on plaintiff's
13 esophagus on May 18, 2001. Dr. Haulk listed plaintiff's
14 postoperative diagnosis as esophageal stricture and a hiatal
15 hernia. Tr. 435. On June 8, 2001, Dr. Haulk performed a second
16 endoscopy and esophageal dilitation. Tr. 445. Thereafter, Dr.
17 Haulk opined plaintiff's esophageal spasms would not improve with
18 surgical treatment. Tr. 446. In addition, Dr. Haulk stated in
19 a July 20, 2001 letter that plaintiff's esophageal spasms were
20 "sudden in onset and disabling in nature and occur frequently
21 enough and are of such severity that he is unable to give a
22 sustained effort. Therefore, his ability to work on any
23 particular day is entirely up in the air. It is my opinion that
24 Terry Ramsey is disabled by the esophageal spasm, despite being
25 compliant with medical advice and undergoing major surgery on two
26 occasions to attempt to correct the problem. More likely than
27 not, this will be a permanent condition." Tr. 465.

1 Dr. Haulk indicated on several occasions that plaintiff's
2 esophageal condition was disabling. For instance, in a letter
3 dated March 12, 2002 Dr. Haulk confirmed plaintiff's esophageal
4 attacks occurring two or three times a week, lasting 10 to 60
5 minutes at a time, with recovery times ranging from 12 to 24
6 hours. Tr. 562. On April 2, 2002 Dr. Haulk found plaintiff's
7 chest pain from his esophageal spasms to be permanently disabling
8 because of the spasms' severity and frequency. Tr. 564. Dr.
9 Haulk examined plaintiff again on December 26, 2002 and opined
10 plaintiff was disabled based on esophageal stricture and
11 inflammation and met the criteria for recurrent peptic ulcer
12 disease of the distal esophagus, depression, and delusions. Tr.
13 607-08. Dr. Haulk stated in his December 26, 2006 letter:

14 In my opinion, Terry is permanently and completely disabled
15 because of his reflux disease, which I think was worsened
16 by complications of surgery performed in an attempt to
17 treat it. I've been seeing Terry for several years now and
18 am convinced that he is not malingering. He is currently in
19 the best state of control I've been able to achieve and
20 despite this treatment, he still frequently awakes in the
21 middle of the night with food material and acid coming into
22 his esophagus. His symptoms have been exacerbated by mild
23 muscular activity. When he has a pain attack, he is
24 physically unable to work.

25 Thereafter, in letters dated February 25, 2003, July 16,
26 2003, and January 5, 2005, Dr. Haulk further opined plaintiff was
27 disabled and prevented from doing substantive work. Tr. 609,
28 759, 788. Dr. David Donnelly, another physician who examined
plaintiff, remarked that "it is reasonable to assume, after
reading the letters from Dr. Anthony Haulk, to believe that the
veteran is disabled at this time and his status probably will not
improve." Tr. 616.

The ALJ, however, found Dr. Haulk's opinions insufficient

1 to establish plaintiff was disabled under the Social Security
2 standard of disability. Tr. 31. The ALJ gave Dr. Haulk's
3 opinion only "some" weight because Dr. Haulk did not appear to
4 have ever treated the plaintiff. Tr. 31. In addition, Dr.
5 Haulk's comments as to plaintiff's employability were deemed
6 beyond his expertise as a medical doctor. Tr. 31. Finally, the
7 ALJ discounted Dr. Haulk's opinions based on his comments
8 regarding plaintiff's financial plight.

9 The ALJ gave more weight to Dr. Williams' testimony, a non-
10 examining medical physician, finding no evidence of esophageal
11 spasms during plaintiff's endoscopy and that taking antacid or
12 sipping water would mitigate the effects from plaintiff's alleged
13 spasms. Tr. 32. The ALJ also disputes plaintiff's credibility
14 based on Dr. Williams' remark that he had never seen symptoms of
15 the severity the plaintiff described in his 38 years as a
16 gastroenterologist. Tr. 32. Further, the ALJ noted that Dr.
17 Williams opined that plaintiff had the ability to lift 20 pounds
18 occasionally and 10 pounds frequently. Tr. 32.

19 Plaintiff argues the ALJ did not accurately characterize
20 the record, especially Dr. Haulk's relationship to plaintiff.
21 Plaintiff contends Dr. Haulk performed two esophageal dilation
22 procedures on plaintiff, examined plaintiff again at least once
23 in December, 2002, and opined multiple times that plaintiff was
24 permanently disabled by his condition.

25 The plaintiff was also examined by Dr. Gerald Otis, a
26 psychologist, on August 18, 1997. Dr. Otis concluded plaintiff
27 suffered from intermittent explosive disorder, dysthmic disorder,
28 and a personality disorder not otherwise specified. Tr. 221. As

1 a result, Dr. Otis assigned plaintiff a global assessment of
 2 functioning ("GAF") rating of 45.⁴ Id. Dr. Otis continued to
 3 treat plaintiff at the VA. On March 7, 2003 Dr. Otis found
 4 plaintiff no longer suffered from personality disorder but opined
 5 that plaintiff met the criteria for an adjustment disorder, which
 6 resulted in impaired social functioning. Tr. 611. In addition,
 7 Dr. Otis noted that although the VA did not have the proper
 8 equipment to diagnose plaintiff with ADHD, plaintiff's childhood
 9 history was consistent with an ADHD diagnosis, along with
 10 plaintiff's responding to the medication Ritalin in the same way
 11 a person with ADHD would be expected to respond. Tr. 611.

12 The ALJ discounted Dr. Otis' opinions because they were not
 13 expressed on VA letterhead and were not based on review of the
 14 plaintiff's entire record. Tr. 33 ("the doctor is not a judge
 15 and does not evaluate the record in a meaningful manner"). As
 16 such, the ALJ gave no weight to Dr. Otis' August 4, 2004 letter
 17 and accepted the state agency psychologists' opinions instead.
 18 Plaintiff argues the ALJ did not give clear and convincing
 19 reasons for dismissing Dr. Otis' opinion.

21 ⁴ A GAF rating of 41-50 is defined as:

22 Serious symptoms (e.g. suicidal ideation, severe obsessional
 23 rituals, frequent shoplifting) or any serious impairment in
 24 social, occupational, or school functioning (e.g. no
 friends, unable to keep a job).

25 Diagnostic and Statistical Manual of Mental Disorders 34
 26 (American Psychiatric Association, 4th ed. Text Revision
 2000).

27 Plaintiff's GAF rating of 45 and the corresponding range of 41-50
 28 was confirmed by a number of other evaluators, for instance:
 intake clinician Lou Ann Myer of Jackson County Health Center
 assigned a GAF rating of 50 (Tr. 492); Dr. Edwin Pearson, a
 psychologist, assigned a GAF rating of 50 (Tr. 529).

1 The ALJ instead relied on state agency psychologists who
2 reviewed plaintiff's records. Tr. 32. Although the
3 psychologists found plaintiff had an adjustment disorder, a
4 personality disorder, a learning disorder, mild ADHD, and a
5 history of intermittent explosive disorder, they concluded
6 plaintiff "had the ability to do a job that involved interacting
7 with others on a superficial basis." Tr. 32-33. The ALJ also
8 cited to evidence provided by Dr. Edwin Pearson, a psychologist,
9 and Dr. William Lofthouse, a VA psychiatrist, who both concluded
10 that although plaintiff's mental impairments were severe
11 plaintiff had mild to moderate difficulty in social and
12 occupational settings. Tr. 27-28.

13 The ALJ appears to have treated Dr. Haulk's opinions as
14 controverted by the testimony of Dr. Williams, especially
15 regarding the evaluation of plaintiff's symptoms and recovery
16 time for his esophageal problems. In addition, the ALJ treated
17 Dr. Otis' opinions as controverted by the evaluations conducted
18 by the state agency psychologists and Drs. Pearson and Lofthouse.

19 Defendant concedes the ALJ did not accurately characterize
20 the treating relationship between Dr. Haulk and plaintiff and did
21 not provide relevant reasons for discounting Dr. Otis' opinion.
22 The Commissioner argues though, before awarding benefits, the ALJ
23 needs to address and clarify whether plaintiff's participation in
24 IT work assignments is valid as substantive work as well as
25 reassess the medical source opinion evidence in the record.

26 When the Commissioner fails to provide adequate reasons for
27 rejecting the opinion of a treating or examining physician, the
28 court credits that opinion as true "as a matter of law" and

1 remands the case for payment of benefits. Pitzer, 908 F.2d at
2 506. The ALJ's rejection of the treating and examining sources'
3 opinions in favor of Dr. Williams' testimony was not supported by
4 substantial evidence in the record. Dr. Williams' testimony by
5 itself does not constitute substantial evidence in the record
6 that warrants a rejection of Dr. Haulk's medical opinions. In
7 addition, the ALJ improperly discounted Dr. Otis' medical
8 opinions even though she relied on substantial evidence in the
9 record, by citing to Dr. Pearson, Dr. Lofthouse, and the state
10 agency psychologists, to conclude that plaintiff's mental
11 impairments did not preclude plaintiff from being able to do
12 light work. Thus, the ALJ failed to provide legally sufficient
13 reasons for rejecting Drs. Haulk and Otis' medical opinions.

14 4. ALJ's Rejection of VA Disability Ratings

15 Plaintiff argues the ALJ improperly rejected the VA's
16 disability ratings. See McCarty v. Massanari, 298 F.3d 1072 (9th
17 Cir. 2002). In September 2003, plaintiff was examined by Dr.
18 Neal Thompson, who noted plaintiff was having spasms in his
19 esophagus between five and twelve times per week, and concluded
20 that plaintiff was not a candidate for active employment. Tr.
21 752-54. Plaintiff cites to VA rating decisions, dated August 20,
22 2003, and December 11, 2004, both stating plaintiff's esophageal
23 stricture is 80% disabling. Tr. 688-92, 703-05. On March 10,
24 2004, the VA granted plaintiff an "individual unemployability"
25 rating effective March 27, 2000. Tr. 694-96. On January 14,
26 2005, the VA stated plaintiff's overall disability rating was 90%
27 based on a 30% disability rating from incisional hernia due to
28 paraesophageal hernia repairs coupled with the original 80%

1 rating for the stricture of esophagus due to the same repairs.
2 Tr. 721.

3 The ALJ relies on McCartey for the proposition that an ALJ
4 may give less weight to a VA disability rating so long as she
5 gives specific reasons for doing so. 298 F.3d at 1076; Tr. 32.
6 The ALJ discounted the VA examiner, a nurse practitioner, as not
7 being an acceptable medical source. Tr. 32. In addition, the
8 ALJ discounted the nurse practitioner and Dr. Thompson's findings
9 because they allegedly relied exclusively on the plaintiff's
10 subjective reports and Dr. Haulk's results rather than their own
11 findings. Tr. 32.

12 Plaintiff argues Dr. Thompson's results should have been
13 considered. The Commissioner concedes the ALJ erred in assigning
14 little weight to plaintiff's VA disability ratings. Defendant's
15 Memo. in Support of Remand, pp. 6, 8. The Commissioner
16 acknowledged Dr. Thompson's independent physical examination
17 results should have been considered. The Commissioner requests
18 a remand to evaluate plaintiff's VA disability rating in
19 accordance with McCartey. However, I find the ALJ had ample
20 opportunity to evaluate Dr. Thompson's examination results in
21 accordance with McCartey. Based on such evidence, the ALJ failed
22 to provide legally sufficient reasons for rejecting the
23 plaintiff's evidence regarding the VA medical determinations.

24 5. ALJ's Failure to Find Plaintiff's Esophageal Impairment
25 Meeting or Equaling a Listed Impairment.

26 If a plaintiff has an impairment or combination of
27 impairments that meets or equals a condition outlined in the
28 "Listing of Impairments," then the plaintiff is presumed disabled

1 at step three, and the ALJ does not need to make any specific
 2 findings as to his or her ability to perform past relevant work
 3 or any other jobs. 20 C.F.R. § 404.1520(d). All relevant
 4 evidence must be evaluated by the ALJ before he or she concludes
 5 plaintiff's impairments do not meet or equal a listed impairment.
 6 Lewis v. Apfel, 236 F.3d 503, 512 (9th Cir. 2001). Further, an
 7 ALJ may not rely on a boilerplate finding to conclude that the
 8 plaintiff has not met or equaled the listed impairment. Marcia
 9 v. Sullivan, 900 F.2d 172, 176 (9th Cir. 1990). Finally, courts
 10 may remand with payment of benefits when the ALJ improperly
 11 rejects evidence which demonstrates the plaintiff meets or equals
 12 the listing. Schneider, 223 F.3d at 976 (citing Lester, 81 F.3d
 13 at 834; Smolen, 80 F.3d at 1292).

14 Plaintiff contends the ALJ erred under Marcia by failing to
 15 elaborate on her determination that plaintiff's esophageal
 16 condition did not meet or equal an impairment listed in Appendix
 17 1, specifically Listing 5.04, peptic ulcer disease.⁵ Plaintiff

18
 19 ⁵ 5.04 Peptic ulcer disease (demonstrated by X-ray or endoscopy).
 20 With:

- 21 A. Recurrent ulceration after definitive surgery persistent
- 22 despite therapy; or
- 23 B. Inoperable fistula formation; or
- 24 C. Recurrent obstruction demonstrated by X-ray or endoscopy.
- 25 or
- 26 D. Weight loss as described under § 5.08.

27 20 C.F.R. Pt. 404, Subpt. P, App. 1 § 5.04 (2007).

28 Although inapplicable to this case, it must be noted that
 listing 5.04 was removed recently because "[a]dvances in medical
 and surgical management have made less common many complications
 from peptic ulcer disease, such as recurrent ulceration (prior
 listing 5.04A) ***." The federal regulations, effective December
 18, 2007, note that the prior listing criteria for this
 impairment is no longer an appropriate indicator since treatment
 often results in significant improvement. See Revised Medical
 Criteria for Evaluating Digestive Disorders, 72 Fed. Reg. 59398,
 23 - OPINION AND ORDER

1 argues the ALJ improperly disregarded medical opinions provided
2 by Drs. Haulk and Donnelly both stating that plaintiff had an
3 extreme esophageal condition and therefore met or equaled Listing
4 5.04. Plaintiff documents medical tests, and the results,
5 related to his esophageal condition including: a barium swallow
6 test in January 1999 indicating esophageal conditioning; a
7 diagnostic upper GI test, indicating a large hiatal hernia;
8 undergoing a second surgery to repair the lower esophageal
9 gastric junction; and two esophageal dilatation procedures
10 performed by Dr. Haulk. See Plaintiff's Opening Brief, pp. 24.
11 Plaintiff relies on comments made by Dr. Donnelly who diagnosed
12 and reported that plaintiff was having ongoing difficulties with
13 nausea, vomiting, and severe esophageal spasms. Tr. 613-16.
14 Plaintiff also notes Dr. Haulk's opinion, who concluded that
15 plaintiff's impairments met Listing 5.04 because he had an
16 endoscopy showing ulceration at the GE junction with peptic
17 etiology. Tr. 607-08. Dr. Haulk commented that plaintiff's
18 condition was recurrent after definitive surgery. Tr. 608.

19 The Commissioner agrees remand is appropriate but requests
20 additional proceedings arguing the record is not fully developed.
21 Specifically, the Commissioner contends additional proceedings
22 are required for the ALJ to fully address the severity of
23 plaintiff's esophageal impairment at step three.

24 The ALJ noted that based on the medical evidence, the
25 plaintiff's esophageal impairment was severe, "but not 'severe'
26 enough to meet or medically equal, either singly or in
27

28 59401 (October 19, 2007).

1 combination to one of the impairments listed in Appendix 1,
2 Subpart P, Regulations No. 4." Tr. 28. The ALJ reviewed
3 plaintiff's medical records regarding his esophageal impairment.
4 Tr. 28. She noted plaintiff underwent Nissen fundoplication
5 surgery in February 1999 which mitigated plaintiff's heartburn.
6 The ALJ also found plaintiff was 20 to 25 pounds over his ideal
7 weight after his fundoplication was repaired in October 1999,
8 even though plaintiff complained he was unable to eat.
9 Thereafter, the ALJ stated that plaintiff's overall condition
10 improved after his dilation surgeries in May and June 2001, with
11 nitroglycerin being especially helpful, despite plaintiff's
12 complaints of choking while eating and the inability to breathe
13 due to physical pain. In addition, the ALJ found that
14 plaintiff's smoking exacerbated his esophageal condition.
15 Finally, the ALJ concluded plaintiff's medical records did not
16 demonstrate that plaintiff had recurrent ulceration, and
17 ultimately dismissed Dr. Haulk's opinion. Tr. 29.

18 Although the ALJ suggested that plaintiff's esophageal
19 condition might be improving, the ALJ did not make findings, as
20 plaintiff notes, as to the nature and extent of plaintiff's
21 esophageal condition in regards to Listing 5.04. Specifically,
22 the ALJ did not provide clear reasons for rejecting Dr. Haulk's
23 medical opinion that plaintiff's esophageal impairment was
24 recurrent. Also, the ALJ did not make findings that plaintiff's
25 physical condition was the result of non-compliance with his
26 prescribed medication, such as his use of nitroglycerin.
27 Notwithstanding the ALJ's decision to find that plaintiff did
28 not meet Listing 5.04, the ALJ did not discuss any reasons for

1 finding that plaintiff's impairments did not equal this listing
2 or other listings as required by the Ninth Circuit. See Marcia,
3 900 F.2d at 176 (ALJ must explain adequately his evaluation of
4 alternative tests and combined effects of impairments in
5 determining whether a claimant equals a listing). Further, the
6 ALJ did not address whether plaintiff's physical and mental
7 impairments, when combined, met or equaled a particular listing,
8 as required by the Ninth Circuit. See Beecher v. Heckler, 756
9 F.2d 693, 694-95 (9th Cir. 1985) (claimant's conditions "must be
10 considered in combination and must not be fragmentized in
11 evaluating their effects").

12 I find plaintiff meets listing 5.04, therefore he is
13 presumptively disabled as to step three of the sequential
14 analysis of disability. 20 C.F.R. § 15.20(a)(4)(iii). Because
15 I conclude plaintiff's condition meets a listed impairment, and
16 he qualifies for benefits at step three, it is unnecessary for me
17 to address the ALJ's application of steps four and five.

18 C. Remand for Payment of Benefits

19 The final question is whether to remand for further
20 administrative proceedings and additional evidence or simply for
21 payment of benefits. A remand for further proceedings is
22 unnecessary if the record is fully developed and the record
23 clearly shows the ALJ would be required to award benefits.
24 Holohan, 246 F.3d at 1210. This rule was adopted to serve the
25 primary purpose of the Social Security act, which was to give
26 financial assistance to the disabled who could not sustain
27 themselves. Id.

1 The record is fully developed in this case and additional
2 proceedings would not be helpful. The ALJ did not properly
3 assess plaintiff's credibility, improperly rejected the VA
4 disability rating, and wrongfully dismissed the medical opinions
5 provided by Dr. Haulk and Dr. Otis.

6 When the Commissioner fails to provide sufficient reasons
7 for rejecting the medical opinion of a treating or examining
8 physician, that opinion is credited as a matter of law. Lester,
9 81 F.3d at 834; Hammock v. Bowen, 879 F.2d 498, 502 (9th Cir.
10 1989). It is clear from the record that if Dr. Haulk's medical
11 opinions were taken into account, the ALJ would be required to
12 find plaintiff disabled if such evidence was credited. Thus,
13 under Lester, I accept Dr. Haulk's opinion and the plaintiff's
14 testimony as a matter of law and, accordingly, remand for payment
15 of benefits.

16 In addition, there are no outstanding issues that must be
17 resolved regarding plaintiff's VA disability ratings nor Dr.
18 Thompson's findings. Here, the VA's disability finding was
19 supported by some medical evidence. McCarty holds that an ALJ
20 "must ordinarily give great weight to a VA determination of
21 disability." 298 F.3d at 107. Thus, the record is fully
22 developed and, giving great weight to the VA disability rating,
23 a finding of disability is clearly required. No purpose would be
24 served by remanding for further proceedings.

25 ///

26 ///

27 ///

28 ///

CONCLUSION

Accordingly, this case is reversed and remanded for payment of benefits. This case is dismissed.

IT IS SO ORDERED.

Dated this 11 day of April 2008.

/s/ Ann Aiken

Ann Aiken
United States District Judge